77-996

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. A-450

LEWIS W. POE, *Petitioner,*

vs.

JOHN C. STETSON, Secretary of the Air Force, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEWIS W. POE
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Petitioner Pro Se

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INDEX

Table of Citations

CASES

CONSTITUTION AND STATUTE

MISCELLANEOUS

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lewis W. Poe, petitioner *pro se*, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. [The remaining, unnamed respondents are: General Charles F. G. Kuyk, Jr., Colonel James L. Jones, Colonel Daniel J. McVicar, Colonel Fred G. Conrad, Colonel William H. King, Colonel Samuel Levinson, Major David Zykorie, in their official capacities.]

OPINION BELOW

The district court rendered no opinion. The Memorandum (App. A, *infra*, pp. A1-A3) of the court of appeals is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. A4) was entered on July 25, 1977. Mr. Poe's timely petition for rehearing was denied without opinion on August 29, 1977 (App. C, *infra*, p. A5). On November 21, 1977, Mr. Justice William Rehnquist signed an order extending the time for the filing of a petition for writ of certiorari to January 16, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Constitution and laws of the United States guarantee a member of the armed forces a right to be free from unlawful seizure, unlawful arrest and imprisonment, the abuse and misuse of process (including the abuse and misuse of the Inspector General System), and the deprivation of his rights (including the right to refuse treatment) and liberty without due process of law.

2. Whether the Ninth Circuit was in error and/or abused its discretion in affirming the district court's dismissal of Poe's complaint on the grounds that Poe "failed to exhaust his administrative remedies."

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment provides, in part:

> Congress shall make no law * * *; * * * abridging the freedom of speech, * * *; or the right of the people * * * to petition the Government for a redress of grievances.

The Fourth Amendment provides, in part:

> The right of the people to be secure in their persons, * * *, against unreasonable searches and seizures, shall not be violated, * * *.

The Fifth Amendment provides, in part:

> No person shall * * *; nor be deprived of life, liberty, or property, without due process of law; * * *.

The Eighth Amendment provides, in part:

> * * *, nor cruel and unusual punishment inflicted.

The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10 U.S.C. 938 [Article 138, Uniform Code of Military Justice] provides:

> "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon."

Paragraph 4-35 of Air Force Manual 168-4, "Administration of Medical Activities," dated 15 March 1973, provides:

> "*Disposition of Person Who Refuses Professional Care.* A medical board will examine any military member who refuses to submit to medical or dental treatment, surgical operation, or diagnostic procedure. If the person bases his refusal on religious grounds, the hospital commander will arrange for the appointment of a chaplain as an additional member of the board. The board must decide:
>
> a. The patient needs the treatment in order to properly perform his military duties, and
>
> b. The treatment can normally be expected to produce the desired results. When the decision on both points is affirmative, the person will be so advised. If he still refuses, he may be tried by courts-martial. Whether or not disciplinary action is taken, the unit commander may initiate appropriate action, such as discharge, retirement, etc. However, before doing so, he will refer the case to HQ USAF/SGP, Wash DC 20314, for consideration and review.
>
> NOTE: When emergency treatment, surgery, or diagnostic procedure is required to preserve the health or life of the patient, it may be performed with or without his permission. The same is true when a diagnostic procedure or treatment is necessary to protect the health or life of a patient who has been declared by a qualified psychiatrist to be mentally incompetent."

Paragraphs 1a, 1c, 1g, and 2a of Air Force Regulation 123-11, "The Inspector General Complaint System," dated 5 June 1973, provide:

1. Air Force Policy on Presenting and Hearing Complaints:

a. All members of the Air Force, military and civilian, have the right to present complaints without fear of retaliatory action. Any person who feels that such action has been taken against him for having submitted a complaint should report it promptly to the base inspector.

* * * *.

c. Any military or civilian member who has knowledge or [sic] mismanagement, violation of Air Force directives, or the existence of an error or an injustice, deficiency, irregularity, waste, fraud or similar condition has a duty to report it to his supervisor, unit complaints officer/NCO, commander, inspector or inspector general.

* * * *.

* * * *.

* * * *.

g. A credible complaint system must exist to give fair and prompt consideration to a member's complaint and provide redress when warranted. The complainant must feel he can enter the system at any level without fear of reprisal or stigma. Interviews or conferences are conducted at times and places convenient for the complainant. All personnel should be aware that the complaint system exists to help them. A cooperative attitude must be exhibited and fostered through proper responsive consideration of all complaints. Follow-up action must be taken on each complaint and disposition placed on record. No form of reprisal, however subtle, is to be taken against the individual.

* * * *.

2. *Commander's Responsibilities*:

a. The commander of each Air Force activity:

(1) Insures that every Air Force member has an Air Force channel of communication to voice a complaint.

(2) Insures that personnel are aware of the complaint system established by this regulation.

(3) Maintains an "open door" policy to insure that personnel have easy access to him to air complaints or seek counsel.

(4) Insures that each complaint, whatever the source, is resolved fairly according to Air Force policy and that the complainant is provided a prompt reply to his complaint.

(5) Never prevents or hinders any member from presenting a complaint to higher authority.

(6) Insures that no reprisal action, however subtle, is taken against a complainant.

STATEMENT OF THE CASE

On Oct. 31, 1973, pursuant to Air Force regulations, Captain Lewis W. Poe filed his *first* Inspector General Complaint with Colonel James L. Jones, the base Inspector General, Dover AFB, Delaware, requesting an investigation into non-professional hospital practices which Poe had been subjected to in order to clear and re-establish his good name, which had been improperly defamed by an Air Force Flight Surgeon. On Nov. 8, 1973, instead of taking action on said complaint, Colonel Jones, with personal animosity toward Captain Poe, ordered Poe to see the

base psychiatrist—without cause. On Nov. 29, 1973, because nothing had been done on his first complaint, Poe filed his *second* Inspector General Complaint, requesting an objective investigation be undertaken to ascertain the truth of his charges against Air Force medical *and* command authorities.

On Dec. 11, 1973, reacting to Poe's *second* complaint, Colonel Fred G. Conrad, Hospital Commander, suggested in a letter to Colonel Charles Kuyk, the Wing Commander, that Captain Poe could possibly be discharged through *administrative* channels but *not* through medical board action. [Subsequently, Poe was separated through abusive, improper, and fraudulent medical board action.]

On or about Dec. 13, 1973, Colonel Jones appointed Lt. Colonel Arthur R. Ellisen to conduct an inquiry into Poe's allegations and charges against hospital personnel and command authorities. On Dec. 19, 1973, Lt. Colonel Ellisen completed his "Report of Inquiry," which was grossly defective because he *never* contacted the complainant Poe—in clear violation of Air Force regulations.

On Dec. 20, 1973, United States Senator Daniel Inouye wrote to Colonel Kuyk on behalf of Captain Poe, indicating his concern.

On or about 28 Dec. 1973, a grossly false and defamatory medical document appeared in Poe's medical records which indicated that Poe was "obviously a psychologically sick man."

On January 8, 1974, Colonel Jones denied Poe's request for a copy of the investigating officer's findings/report.

On Feb. 3, 1974, Poe wrote a letter to United States Senator Hiram Fong, stating that "I now feel there is a suspect series of events (or conspiracy) taking place."

On Feb. 5, 1974, the Office of the Inspector General, USAF, Washington, D.C., prepared and published a document entitled, "Summary Report of Inquiry Concerning Captain Lewis W. Poe," which indicated, in part:

> "Because of the possible impact on Capt Poe's mental health, it is not appropriate to present detailed replies to each allegation."

On February 5, 11, and 12, 1974, Poe went to see a *civilian*, clinical psychologist to obtain evidence *to refute* the false military medical document. Result: Poe is basically a sound individual.

As of March 3, 1974, Colonel Jones was in violation of Air Force regulations. Moreover, the Military Airlift Command Inspector General, Scott AFB, Illinois, was also in violation of Air Force regulations. Thus, on March 3, 1974, Poe wrote his *third* Inspector General Complaint and mailed it to General Gerald Johnson, the Inspector General, HQ USAF, Washington, D.C. on March 7, 1974. Poe requested that a *proper* investigation be undertaken. Poe did not receive a reply, which is in violation of Air Force regulations.

On April 16, 1974, Colonel Daniel J. McVicar, the Air Base Group Commander, told Captain Poe that the deck was stacked against him. On May 21, 1974, Poe wrote a letter to Colonel Kuyk, the Wing Commander, suggesting that Kuyk contact his co-workers to seek the complete truth as to his character and "mental status" in the interest of justice. On May 26, 1974, Poe wrote a letter to the Secretary of the Air Force, requesting a full, impartial, formal investigation. The Secretary never replied nor took any effective action on said letter.

On May 28, 1974, the Group Commander, in bad faith and in collusion with the Hospital Commander and the

Wing Commander, *unlawfully ordered* the hospitalization of Captain Poe *under the guise* of a legitimate inpatient evaluation, in violation of Air Force regulations and the Constitution and laws of the United States. On May 29, 1974, several members of the Security Police Squadron, Dover AFB, Delaware, without warrant, without probable cause, without Poe's consent, unlawfully assaulted, searched, and arrested Poe and took Poe, under threat of serious bodily harm and against Poe's will, to the base hospital. Thereafter, Poe was unlawfully transported under guard of a Security Policeman to Andrews AFB, Maryland. Subsequently, Poe was flown to Wright-Patterson AFB, Ohio, and was totally, involuntarily, and unconstitutionally confined in a psychiatric ward at Wright-Patterson USAF Medical Center, in violation of the Bill of Rights and in violation of the Air Force's own regulations.

On June 6 and 7, 1974, *without* medical cause, *without* Poe's consent, against Poe's will and over his verbal protests, "antipsychotic" phenothiazine derivatives [trade name Thorazine] were *forcibly* injected into the person of Poe while Poe struggled to avoid the hypodermic needle—all in violation of Air Force regulations.

On June 20, 1974, an Air Force psychiatrist told Poe that Poe did not have a psychiatric disorder nor a paranoid personality. On June 27, 1974, that same psychiatrist, with deceit, collusion, fraud, and reckless disregard of the consequences of his acts, fabricated and published a false and defamatory medical report.

On August 10 and 17, 1974, Poe underwent a psychiatric evaluation (while still a resident at Wright-Patterson Medical Center and unbeknown to the USAF Hospital staff) by a *civilian* psychiatrist, Dr. O. B. Cataldi, who has

documented "Diagnostic Impression: Compulsive Personality."

On or about September 4, 1974, Poe was relieved from active duty because he was "board rated" as 70 per cent mentally disabled and was falsely and fraudulently labelled "a severe, chronic paranoid schizophrenic."

On September 8, 1974, Poe, *now a free civilian*, was admitted, at his own request, to a civilian psychiatric hospital for intensive evaluation under the supervision of Dr. Cataldi. Dr. Cataldi documented in his Summary that "there are no signs of paranoid thinking or signs of psychosis evident. . . . Mr. Poe will be discharged on September 20, 1974, and he can go back to work right away."

On April 29, *1976*, Poe filed his complaint in Civil Action No. 76-0160, *Poe* v. *Reed, et al.*, in the U.S. District Court for the District of Hawaii. *The jurisdiction of the district court was invoked* pursuant to a federal question, 28 U.S.C. 1331(a); diversity of citizenship, 28 U.S.C. 1332 (a); and the "mandamus statute," 28 U.S.C. 1361.

On July 9, 1976, the district judge dismissed the action.

On Sept. 16, 1976, Poe appealed. On July 25, 1977, the court of appeals affirmed on the grounds that "Appellant has failed to exhaust his statutory administrative remedies." (App. A, *infra*, p. A2).

On August 3, 1977, Poe filed his timely Petition for Rehearing in the court of appeals.

On August 31, 1977, the Ninth Circuit filed its Order, denying Poe's petition for rehearing (App. C, *infra*, p. A5). No opinion was rendered thereto.

REASONS FOR GRANTING THE WRIT

In support of the petition for a writ of certiorari, consider the following points and argument:

1. The decision of the Ninth Circuit is in conflict with a Supreme Court principle. In *Califano* v. *Sanders*, 97 S.Ct. 980, 986 (Feb. 23, 1977), Mr. Justice Brennan, delivering the Opinion of the Court, stated in pertinent part:

> "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."

On page 2 of the record on appeal (Complaint, p. 2, paragraph 6), Poe wrote in part:

> "Briefly, plaintiff is seeking, inter alia, the resolution of one or more constitutional issues—the deprivation of plaintiff's liberty and bodily integrity without due process of law and false imprisonment without probable cause, without warrant, and contrary to law. Plaintiff alleges that certain actions by Air Force personnel were unconstitutional and violative of Air Force Regulations."

On page 4 of his Petition for Rehearing, Poe wrote in part:

> "The AFBCMR [Air Force Board for Correction of Military Records] *cannot* adjudicate the *constitutional* issues involved in this case. The relief requested is simply not within the power of the AFBCMR to grant." (See *Hodges* v. *Callaway*, 499 F.2d 417, 420-421, 5th Cir. 1974.)

2. The decision of the Ninth Circuit was erroneous and contrary to the weight of authority. The Ninth Circuit wrote in its memorandum (App. A, *infra*, p. A1):

> "Federal court review of internal military affairs generally is restricted absent '(a) an allegation of the deprivation of a constitutional right . . . and (b) exhaustion of available intraservice corrective measures.' (Citations omitted.)
>
> The second prong of this test is not met here. * * * *."

Thus, the Ninth Circuit manifestly indicated that the *first* prong of the test was satisfied here. However, constitutional questions are unsuited to resolution before administrative agencies. No Air Force administrative body is available to fully and adequately adjudicate the constitutional issues involved. Hence, it is *not* possible for Poe "*to fail* to exhaust his administrative remedies" when such are simply not adequate.

The federal courts are courts of limited jurisdiction. The federal courts *have jurisdiction* to decide federal constitutional questions—not military administrative bodies. Administrative agencies are even more limited in terms of subject matter jurisdiction. The federal judiciary is in a better position to consider the constitutional issues involved than are military administrative bodies. See *Committee for GI Rights* v. *Callaway*, 171 U.S. App. D.C. 73, 518 F.2d 466, 474 (D.C. Cir. 1975).

Moreover, Ninth Circuit Judge Walter Ely wrote in the Memorandum (App. A, *infra*, p. A3):

> "In short, Poe is entitled, at some time, to have his grievances aired in a federal forum. * * *."

3. The first and primary question presented for review is constitutionally important for this Court to adjudicate because the ultimate outcome and consequences of the currently disputed decision will affect not only Poe's legal rights but the fundamental rights of all present and future servicemen and women. The settlement of the constitutional questions by this Court is obviously in the interest of the patriotic men and women who have served their country in peacetime as well as during war.

This Court's decision is vitally needed to further *narrow* the doubt and incertitude in the "law of arrest and psychiatric imprisonment" *in the armed forces*. Cf. *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). Furthermore, the decision of this Court will impact upon the "traditional" reluctance of the federal courts "to interfere" with military affairs—a reluctance which over the years has indirectly caused the *elevated* abuse of military processes and which has brought Mr. Poe to the doorsteps of this Honorable Court. The military is not beyond the law—especially, its own regulations. The military is bound by its own regulations.

A direct effect on the *proper* administration and actual functioning of the Inspector General Complaint System is at stake. Is the Inspector General Complaint System mere words, or can a member of the armed forces *believe* what he reads in the pertinent regulations? This Court's decision will further delineate, curb, and check the unreasonable and unconstitutional abuses and misuse of military processes, relative to the specific and penumbral guarantees of the Bill of Rights *in a military context*.

> On page 8 of his Petition for Rehearing, Poe reiterated: "The appellant asserts that not only is there an actual controversy regarding his constitutional and legal rights but that an immediate and serious issue concern-

ing plaintiff's right to military re-employment exists. On December 17, 1976, a Formal USAF Physical Evaluation Board, after careful consideration and evaluation of documents (evidence) and the sworn testimony of the appellant, recommended that the appellant be returned to active military duty. Thus, the appellant is legally entitled to military re-employment, but the appellant will *not* accept re-employment *if, as a serviceman,* he is *not* protected by the Constitution of the United States. As pointed out previously, the primary issue is constitutional. Can the appellant be subjected to unlawful military orders, unlawful and unconstitutional arrest and imprisonment without due process of law while performing active duty as a serviceman? The legal issues are of transcendent value to all servicemen and civilians who may eventually become servicemen."

4. The decision below, departing from tradition and the aforementioned principle, calls for an exercise of the Supreme Court's power of supervision to maintain uniformity in federal matters among the various circuits and the United States Court of Claims. The definitive determination (or reaffirmation of a previous policy) of the *proper application* of the "exhaustion doctrine" is in the public interest and will bring greater and renewed uniformity of (a) judicial discretion and procedures in this area and (b) the administration of justice. The variant and diverse approaches to the "exhaustion requirement" among the circuit courts is well known. See *Rew* v. *Ward*, 402 F. Supp. 331, 333 fn. 7 (D.C. New Mex. 1975); *Parisi* v. *Davidson*, 405 U.S. 34, 38, 92 S.Ct. 815, 818 fn. 3 (1972); *Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F.2d 381, 398-399 (1962), *cert. den.* 373 U.S. 932 (1963): *Ogden* v. *Zuckert*, 111 U.S. App. D.C. 398, 298 F.2d 312, 315-317 (D.C. Cir. 1961).

CONCLUSION

For the above reasons, petitioner prays this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

LEWIS W. POE
Petitioner Pro Se

January 6, 1978.

APPENDIX

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 76-3237

LEWIS W. POE,
Plaintiff-Appellant,

vs.

JOHN C. STETSON, Secretary of the Air Force, et al.,
Defendants-Appellees.

MEMORANDUM

[July 25, 1977]

Appeal from the United States District Court
for the District of Hawaii

Before: ELY, HUFSTEDLER and WRIGHT, Circuit Judges.

Appellant, a former Air Force Captain, was discharged because of mental ill health. This appeal arises from the dismissal of his complaint alleging that the circumstances surrounding his separation from the service, including psychiatric examinations, constituted: defamation of

character, illegal arrest, illegal search and seizure, conspiracy, false imprisonment, deprivation of civil rights, falsification of records, invasion of privacy, impermissible loss of pay and retirement benefits and assault. He seeks declaratory relief and reinstatement as a commissioned officer.

Federal court review of internal military affairs generally is restricted absent "(a) an allegation of the deprivation of a constitutional right . . . and (b) exhaustion of available intraservice corrective measures." *Mindes* v. *Seaman,* 453 F.2d 197, 201 (5th Cir. 1971), *cf. Gonzales Salcedo* v. *Lauer,* 430 F.2d 1282, 1283 (9th Cir. 1970).

The second prong of this test is not met here. Appellant has failed to exhaust his statutory administrative remedies. One such remedy is by application to the Air Force Board for the Correction of Military Appeals which has the authority to grant his reinstatement and restoration of rights. 10 U.S.C. § 1552 (1970); 32 C.F.R. § 865.1 *et seq.* (1976). No showing has been made that requiring such a step would be futile. *Champagne* v. *Schlesinger,* 506 F.2d 979 (7th Cir. 1974).

We affirm the district court's dismissal of appellant's complaint because he failed to exhaust his administrative remedies. Consideration of his claims prior to the exhaustion of such remedies would be premature. *Beard* v. *Stahr,* 370 U.S. 41 (1962); *Stanford* v. *United States,* 413 F.2d 1048 (5th Cir. 1969).

AFFIRMED.

ELY, Circuit Judge (Concurring):

I concur in the result only because the majority opinion makes it clear that Poe is not permanently foreclosed from a resolution of the questions which he seeks to present. It may be that Poe can attain relief from the Air Force Board for the Correction of Military Appeals. Or, if that Board refuses to consider Poe's grievances, he may have recourse to the Court of Claims. That is because he seeks, *inter alia,* reinstatement to the Air Force and back pay. *See* 28 U.S.C. § 1491; *Carter* v. *Seamans,* 411 F.2d 767, 773-76 (5th Cir. 1969).

In short, Poe is entitled, at some time, to have his grievances aired in a federal forum. It may be inferred from my concurrence that I respect the views of my colleagues that there are other avenues that Poe should follow in seeking relief before he invokes the jurisdiction of a District Court.

I add, incidentally, my opinion that the District Court clearly erred in dismissing Poe's amended complaint upon the grounds that the court lacked jurisdiction and that, assuming that I interpret the District Court's Order correctly, Poe could *never* state a claim upon which relief could be granted. As to this, I note that Poe alleged that the Air Force did not comply with its own regulations.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 76-3237

DC CV 76-0160 SPK

LEWIS W. POE,
Plaintiff-Appellant,

vs.

JOHN C. STETSON, Secretary of
the Air Force, et al.,
Defendants-Appellees.

JUDGMENT

(Filed September 12, 1977)

APPEAL from the United States District Court for the District of HAWAII (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of HAWAII (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY

ATTEST 9/9/77

/s/ (Illegible)
Clerk

Filed and entered July 25, 1977.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 76-3237

LEWIS W. POE,
Plaintiff-Appellant,

v.

JOHN C. STETSON,
Secretary of the Air Force, et al.,
Defendants-Appellees.

ORDER

(Filed August 31, 1977)

Before: ELY, HUFSTEDLER and WRIGHT, Circuit Judges.

The Petition for Rehearing has been considered and is denied.

DATED: August 29, 1977.

No. 77-996

In the Supreme Court of the United States

OCTOBER TERM, 1977

LEWIS W. POE, PETITIONER

v.

JOHN C. STETSON, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORAKI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-996

LEWIS W. POE, PETITIONER

v.

JOHN C. STETSON, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner, a former Air Force Captain, was discharged from active service because of mental illness (Pet. App. A1). He filed this suit in the United States District Court for the District of Hawaii, seeking declaratory and injunctive relief, reinstatement, and back pay. He alleged that his involuntary confinement for psychiatric evaluation and subsequent discharge involved, *inter alia,* illegal arrest, false imprisonment, falsification of records, and deprivation of his civil rights. The district court dismissed the complaint, ruling that the court lacked jurisdiction over the defendants, that petitioner had failed to exhaust his administrative remedies, and that petitioner failed to state a claim on which relief could be granted.

The court of appeals affirmed (Pet. App. A1-A3). Stating that "[f]ederal court review of internal military affairs generally is restricted absent '(a) an allegation of the deprivation of a constitutional right . . . and (b) exhaustion of available intraservice corrective measures' " (Pet. App. A2), the court found that petitioner had not satisfied the second requirement. Because "[n]o showing ha[d] been made that requiring such a step would be futile," the court concluded that consideration of petitioner's claims before exhaustion of his administrative remedies would be premature (*ibid.*).

2. The decision of the court of appeals is correct and does not present an issue meriting review by this Court.

Alleging that the Air Force violated its own regulations and his constitutional right to due process of law by hospitalizing him without his consent (Pet. 11), petitioner contends that he need not seek administrative review of his complaints because such action would be futile. As the court of appeals observed (Pet. App. A2), however, petitioner made no concrete showing that relief through administrative channels is unavailable. Whether or not the Air Force Board for the Correction of Military Records (AFBCMR) can "adjudicate the constitutional issues involved" (Pet. 12), the AFBCMR has full power to correct any records that erroneously indicate mental illness and to order petitioner's reinstatement with full restoration of rights.[1] 10 U.S.C. 1552. Should the AFBCMR grant such relief, judicial consideration of petitioner's constitutional claims would be unnecessary.[2]

---

[1]Petitioner seeks no damages other than accrued back pay.

[2]Although 10 U.S.C. 1552(b) requires that an applicant file any request for correction "within three years after he discovers the error or injustice," it provides that an untimely filing may be excused if the Board "finds it to be in the interest of justice." Thus, the Board's power to review the alleged injustices against petitioner is not limited to events occurring within the three-year period.

This Court traditionally has been reluctant to interfere in military affairs, especially when the military has not been given an opportunity to consider and correct alleged errors. *Schlesinger* v. *Councilman*, 420 U.S. 738, 754-760. Cf. *McGee* v. *United States*, 402 U.S. 497; *McKart* v. *United States*, 395 U.S. 185, 194-195. Similarly, the federal courts often defer determination of constitutional questions if an administrative decision might make such review unnecessary. *Beard* v. *Stahr*, 370 U.S. 41; *Horn* v. *Schlesinger*, 514 F. 2d 549, 553-554 (C.A. 8). As the Eighth Circuit explained in *Horn*, *supra*, 514 F. 2d at 553:

> We do not share the plaintiff's pessimism [that exhaustion of administrative remedies will be futile]. We will indulge, until otherwise convicted, in the presumption that the military will be astute to afford to the plaintiff all of the rights and the protections afforded him by the Constitution, the statutes, and its own regulations. It will not be forgotten, of course, that the Board's action is subject to judicial reversal if it is arbitrary, capricious, unsupported by substantial evidence or erroneous in law. [Footnotes omitted.]

Petitioner has not alleged any special interest in, or need for, premature judicial review that would justify disregard of the military's right to correct its own errors. See *Sanders* v. *McCrady*, 537 F. 2d 1199 (C.A. 4); *Mindes* v. *Seaman*, 453 F. 2d 197 (C.A. 5). Thus, as the court of appeals concluded (Pet. App. A2), judicial consideration of his claim at this time would be premature.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

DOJ-1978-03

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-996

LEWIS W. POE, *Petitioner,*

vs.

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Resopndents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

First, the petitioner was discharged *not* because of *actual* mental illness—but because of *false* and *fraudulent* Air Force *medical documentation* which *stated* that the petitioner was mentally ill.

The remainder of petitioner's reply will address the respondents' claim that "the petitioner made no concrete showing that relief through administrative channels is unavailable." Respondents' claim is inaccurate.

In support of petitioner's position, pages 4-8 of his Petition for Rehearing to the Ninth Circuit, dated August 1, 1977, are quoted below:

"Let's assume, *arguendo*, that this Court of Appeals is correct and that Poe could apply to the AFBCMR *for* declaratory relief (adjudication of constitutional issues), *assuming further* that the AFBCMR would extend the time limit for filing of Poe's application in the interest of justice, knowing full well that Poe is *not* filing his application for the correction of his military records nor for back pay. See 32 C.F.R. § 865.4 (1976).

According to 32 C.F.R. § 865.1, the purpose of the AFBCMR is to consider applications for the correction of military records. The AFBCMR *cannot* adjudicate the *constitutional* issues involved in this case. The relief requested is simply not within the power of the AFBCMR to grant. The AFBCMR is unable to grant adequate relief to Poe.

However, let's assume, *arguendo*, that the AFBCMR *at least* reinstated Poe in the Regular Air Force. But Poe *cannot* accept said reinstatement because the constitutional issue has not yet been resolved, and Poe will not place himself in a military situation again where military authorities can abuse their power, can violate their own regulations, and can do the same thing to Poe whenever they choose to—in utter disregard of their regulations and our Bill of Rights.

According to 32 C.F.R. § 865.2 et seq., following a hearing [assuming a hearing is granted—see *Rew* v. *Ward*, 402 F. Supp. 331, 335 (D. New Mexico 1975) and see 32 C.F.R. § 865.8 (1976)], the AFBCMR will make recommendations to the Secretary of the Air Force. Let's assume the AFBCMR recommends that Poe be reinstated as a Regular Captain in the Air Force. The Secretary has the final word in this matter. See 32 C.F.R. §§ 865.12 and 865.13; *Champagne* v. *Schlesinger*, 506 F.2d 979, 982-983 (7 Cir. 1974); *Horn* v. *Schlesinger*, 514 F.2d

549 (8 Cir. 1975). The Secretary of the Air Force will reject such a recommendation. Why? Because, on Dec. 17, 1976, the Formal Physical Evaluation Board recommended that Captain Poe be returned to active duty, and, on April 14, 1977, the Secretary ordered Poe separated from the Air Force because Poe "is physically unfit to perform the duties of his grade by reason of physical disability."

So Poe did *more* than "apply to the AFBCMR"—he followed the law and the instructions of the Department of the Air Force, and *eventually* went to *the Secretary* under whom the AFBCMR functions. See 10 U.S.C. § 1552; 32 C.F.R. § 856.1 et seq.; *Brownfield* v. *United States*, 148 Ct. Cl. 411, 414-415 (1960). Brownfield took his grievances *directly to* the Secretary of the Air Force and *sufficiently exhausted* his administrative remedies despite the fact that he did not appeal to the Board for the Correction of Military Records.

This Court of Appeals has stated that "No showing has been made that requiring such a step would be futile," and cited *Champagne, supra*. In *Champagne*, at page 983, the Seventh Circuit wrote, in part:

> "If plaintiffs are correct about the fruitlessness of an appeal to the BCNR, there is ample authority to support their contention that exhaustion is improper. • • • [Citations omitted.]
>
> • • •.
>
> Plaintiffs also argue that since the BCNR can only recommend action to the Secretary of the Navy and since the Secretary of the Navy's own Instruction clearly defines his view, further intraservice appeal is useless." [Footnote omitted.]

Poe is claiming *and has claimed* that an appeal to an administrative body, such as the AFBCMR, is futile. See pages 134, 138-139, 144, 146-147 of the record on appeal; see page 12 of the Brief of the Appellant; see pages 9 and 11 of the Brief in Reply. If the Ninth Circuit has overlooked or misunderstood the appellant's position in this case/complaint, I hope it is now clear that to appeal to the AFBCMR is a waste of time and will only delay the final adjudication of the constitutional issues. The "remedy" which was suggested by this Court of Appeals is not capable of affording full relief to the plaintiff. In the words of the Fifth Circuit,

> "* * *, the exhaustion doctrine in review of military discharge decisions is subject to limitation or exceptions. The most important of these is that only those remedies which provide a real opportunity for adequate relief need be exhausted. Stated somewhat differently, exhaustion is inapposite and unnecessary when resort to the administrative reviewing body would be futile." [Footnote omitted.] *Hodges* v. *Callaway*, 499 F.2d 417, 420 (5th Cir. 1974).

The full restoration of Poe's rights would be impossible for the AFBCMR to grant because Poe *was* deprived of his right to liberty *without* due process and *in violation of* the Air Force's own regulations. On pages 133-134 of the Record on Appeal, Poe wrote:

> "* * * the persistent utilization [by the plaintiff] of AF Reg 123-11, AF Reg 120-3, AF Reg 110-19 (see defendants' composite Exhibit No. 2) was a proximate cause of plaintiff's unlawful seizure, false arrest and imprisonment. Plaintiff is in court today because *he did* avail himself of Air Force procedures. So Mr. Eggers' statement that 'plaintiff has failed to avail himself' of these regulations is utterly absurd. As

stated previously, plaintiff is not asking and has not asked for a correction of his military records because that is not the real issue. The issue could be stated: Does the Constitution and laws of the United States guarantee the plaintiff a right to be free from unlawful seizure, unlawful arrest, the abuse and misuse of process, and the deprivation of his liberty without due process of law? If so, then this Complaint (Civil Action No. 76-0160) stands independently.

Furthermore, Mr. Eggers stated that if there is any validity to any of the claims set forth in the complaint, those issues may be resolved administratively and entirely moot the instant cause of action. Nothing could be further from the truth. Pray tell, what *administrative* body can legally decide the *constitutional* issues in this matter? Any attempted administrative procedure or 'remedy' would be wholly inadequate and futile."

Moreover, an Airman was *not* required to exhaust her administrative remedy before the AFBCMR before contesting her administrative discharge and suing in the U.S. District Court for the District of New Mexico. See *Rew* v. *Ward*, 402 F. Supp. 331 (D. N. Mex. 1975). In *Rew* v. *Ward*, District Judge Bratton wrote, in part, at p. 334:

> "When one scrutinizes the specific administrative system here involved, the Air Force Board for Correction of Military Records, in light of the foregoing policies, as *McKart* [*McKart* v. *United States*, 395 U.S. 185 (1969)] instructs the court to do, it becomes all too apparent that due to fiscal neglect and lack of legislative reform the BCMR is totally inept at handling with fairness questions such as those raised by the plaintiff herein."

At pp. 336-337:

> "Although the Secretary * * * has the authority to reinstate a former serviceman, * * * , Air Force policy is that reinstatement is not generally granted except * * *. (Footnote omitted.) No applicants have been reinstated in the Air Force for the last ten years.
>
> * * *.
>
> In light of the above description of the Air Force BCMR it can be said with conviction that: (1) for Airman Rew to seek relief by pursuing her administrative remedy would not only be expensive and time consuming but also totally useless; * * *. The men and women of our nation's Air Force deserve better treatment in return for their service.
>
> This court shares along with others the traditional judicial reluctance to interfere with the military establishment. However, this rule too has its limits as the court-martial (footnote omitted) and selective service cases well attest. The interference is minimized here because the litigation is postdischarge.
>
> * * *. But even assuming this decision will increase federal filings, at least until the military and Congress can respond with the creation of a more viable administrative remedy, *our federal courts cannot shirk from their constitutional and equitable duties* merely to retain a more manageable caseload." (Emphasis added.)

In *Sohm* v. *Fowler*, 365 F.2d 915, 918 (U.S. App. D.C. 1966), the D.C. Circuit wrote:

> "* * * it has evolved to the point where it can be formulated as a rule that the administrative remedy should be exhausted unless the party invoking the court's jurisdiction can demonstrate special circumstances. (Footnote omitted) * * *."

Poe claims that he has demonstrated special circumstances in this case."

Secondly, resort to the AFBCMR is a *permissive* remedy. See *Cason* v. *United States*, 200 Ct. Cl. 424, 432, 471 F.2d 1225 (1973); Glosser & Rosenberg, Military Correction Boards: Administrative Process and Review by the U.S. Court of Claims, 23 Am. U.L. Rev. 391 (1973). In *Mathis* v. *United States*, 183 Ct. Cl. 145, 147-148, 391 F.2d 938 (1968), the Court of Claims stated, in part:

> "We held in *Kirk* v. *United States, supra*, 164 Ct. Cl. at 742-43, that resort to the Discharge Review Board *is permissive, not mandatory*, and the same is true, *a fortiori*, of the Correction Board. Plaintiff had an Army board * * * in September 1960 before his separation, and *that was the only required* administrative remedy. (Footnote omitted.) * * *." [Emphasis supplied.]

Thirdly, Mr. Poe's *compliance* with Air Force regulations, "not perfection of an ABCMR appeal, marks the point where military administrative procedures have been exhausted. Department of Justice Memo No. 652 (Oct. 23, 1969)." *Parisi* v. *Davidson*, 405 U.S. 34, 38, 92 S. Ct. 815, 818 fn. 3 (1973).

Finally, the respondents cited 10 U.S.C. 1552 and *speciously* stated:

> "Whether or not the Air Force Board for the Correction of Military Records (AFBCMR) can 'adjudicate the constitutional issues involved' (Pet. 12), the AFBCMR has full power to correct any records that

erroneously indicate mental illness and to order petitioner's reinstatement with full restoration of rights. (footnote omitted) 10 U.S.C. 1552. Should the AFBCMR grant such relief judicial consideration of petitioner's constitutional claims would be unnecessary. (footnote omitted.)"

Moreover, the respondents did *not* even show that the AFBCMR had subject matter jurisdiction here. In fact, the AFBCMR does *not* have jurisdiction. (See paragraphs 1, 2, and 4 of AF Regulation 31-3(C3), dated 1 April 1977, Air Force Board for Correction of Military Records.) In examining the background and Congressional intent of Sections 207 and 131 of the Legislative Reorganization Act of 1946, we find that:

"These two sections must be read together. They evidence an intention of Congress to free itself from the burden of dealing with such matters by private bills * * *. Of the private acts heretofore passed which might conceivably be said to relate to the correction of military or naval records a large percentage have related to individuals who received discharges other than honorable. * * *.

* * *.

The correction of the record and the issuance of a new discharge may be regarded as acts of clemency, or in mitigation, *precisely comparable in effect* to a successful appeal *to the Congress* for relief *by private act*.

Section 207 is a remedial provision * * *. * * *, it should *not* be extended by construction so as to effect a result clearly beyond the purpose of the Congress. Furthermore, the words of the section, * * *, appear to afford an adequate means for in-

suring that the *application* of the section *is limited to* its *intended* scope as *a substitute* for relief by private acts.

* * *. Furthermore, section 207 is *not* to be regarded as superimposing a *further* means of review, freely available, upon the procedures previously set up. * * *." (Emphasis added.) 40 Op. Atty. Gen. 504 (1947).

Thus, the respondents—in asserting that Poe *must* take his complaint to the AFBCMR—are really declaring, *in theory and in effect*, that Poe *must* take his complaint to Congress (to ask for relief by private act).

Thus, *by existing law*, how does the AFBCMR acquire jurisdiction over the instant case, which is laden with constitutional issues?

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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Petitioner Pro Se

March 21, 1978.